ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No.98-147
Advanced Telecommunications Capability	)	

COMMENTS OF
e.spire COMMUNICATIONS, INC.

e.spire COMMUNICATIONS, INC.

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SUMMARY

e.spire firmly supports the Section 706 goal of ensuring the deployment of advanced telecommunications capability to all Americans and applauds the Commission for steps it already has taken in this regard through the opening of its Section 706 NOI and the issuance of its first Order and NPRM in this docket. e.spire and other CLECs are ready, willing and able to compete in the market for advanced telecommunications services. However, CLEC efforts to roll-out such advanced services have been seriously impeded by the pervasive unwillingness of ILECs to comply fully with Section 251 of the Act and the Commission's rules and policies interpreting that section.

As explained in these comments, e.spire respectfully submits that the purposes of Section 706 can best be achieved by derailing ILEC refusals to provide necessary unbundled network elements UNEs, efficient collocation arrangements, and interconnection for packet switched services – rather than by permitting ILECs to create advanced services affiliates that operate outside the scope of Section 251(c).

Indeed, e.spire submits that the Commission's ILEC advanced services affiliate proposal cannot be squared with Section 251 nor justified by the Commission's interpretation of Section 272. Even if the appropriate statutory foundation existed for the Commission's proposal, its adoption and implementation would retard the development of local competition and the deployment of advanced telecommunications capability. The creation of truly separate ILEC affiliates simply is not feasible. As a result, the Commission's ability to detect discriminatory and anticompetitive behavior by the ILEC and its Section 251(c)-free alter-ego would be quite limited – the possibility that the Commission actually could enforce the tome of new regulation proposed in the NPRM seems even more remote.

Nevertheless, if the Commission decides to press forward with its separate affiliate proposal, the structural separations rules and safeguards proposed need to be supplemented substantially. Importantly, an ILEC advanced services affiliate should be prohibited from sharing *any* resources or customer proprietary information with its parent. The Commission also must bar such an affiliate from using any of the brands or marks of its parent. To protect against discrimination, the Commission should adopt a rule allowing CLECs to adopt either all *or any portion* of interconnection agreements entered into by ILECs and their advanced services affiliates.

Regarding these affiliates, e.spire also submits that structural separations rules should apply regardless of the size of the ILEC and should not sunset. ILEC advanced services affiliates should be required to file access tariffs and should not be eligible to resell ILEC services pursuant to Section 251(c)(4). Additionally, the Commission should adopt an absolute bar on the transfer of *any* asset between an ILEC and such an affiliate, as that clearly would make the affiliate an assign.

Returning to an appropriate course of action, e.spire generally supports the Commission's proposals regarding collocation and loop unbundling. Reformed national collocation rules that incorporate the best practices of the states will promote competition and facilitate the deployment of advanced telecommunications capability. Among the proposals the Commission should incorporate into uniform national rules are the Extended Link, shared cages, cageless collocation and "adjacent" collocation. The Commission also should adopt rules allowing unrestricted cross connects between collocated CLECs and establishing provisioning intervals and liquidated damages provisions for missed intervals. Unreasonable ILEC restrictions on the types of equipment that can be collocated also should be barred.

e.spire firmly supports the Commission's efforts to ensure that CLECs have adequate access to the "last mile." National minimum unbundling requirements based on functional UNE definitions should evolve to reflect the experience gained over the past two years. To eliminate guessing games involved in obtaining access to conditioned loops, ILECs should be required to make available electronically a "loop inventory" which should be updated on no less than a monthly basis. The Commission also should adopt rules making clear that two different service providers can provide service over the same loop and that ILEC voice services still are subject to the resale requirement of Section 251(c)(4), even in cases where the CLEC seeking to resell an ILEC's voice services provides data services over the same loop on an unbundled basis.

The Commission also should adopt a rule establishing four basic loop types and, based thereon, creating a uniform framework for imposing unbundled loop recurring and nonrecurring charges. To expand the reach of competitive advanced telecommunications service offerings, the Commission should require ILECs to unbundle electronically-equipped loops, as well as electronically capable loops. The Extended Link also should be defined as a UNE.

Regarding loops that pass through remote terminals, e.spire agrees with the Commission's tentative conclusions that unbundling conditioned loops is presumed "technically feasible" if the ILEC is capable of providing xDSL-based services over that loop. In short, if an ILEC uses a conditioned loop for its own services, it must be technically feasible to provide unbundled access to that same loop, regardless of whether it passes through a remote concentration device. To enhance competitors' ability to provision advanced services, the Commission also should require ILECs to offer subloop components, including feeder plant, concentration devices, and distribution plant, as UNEs.

e.spire also submits that, to the extent advanced services are offered by ILECs to end users pursuant to federal tariffs, they are "retail" services and are subject to the resale requirements of Section 251(c)(4).

Finally, e.spire believes that it is neither necessary nor appropriate to grant any RBOC interLATA relief at this time. Moreover, e.spire submits that the Commission's authority to grant even "targeted" interLATA relief actually is quite limited, as its ability to *modify* LATA boundaries does not permit it to grant generally applicable changes or pierce all LATA boundaries in even a "small-scale" or limited way.

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COMMENTS OF e.spire COMMUNICATIONS, INC.

e.spire Communications, Inc. ("e.spire"), by its attorneys, respectfully submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("*706 NPRM*" or "*NPRM*") issued in the above-captioned docket.[1] As set forth below, e.spire opposes the Commission's proposed authorization of incumbent local exchange carrier ("ILEC") advanced services affiliates. The proposal lacks any statutory foundation and actually threatens to hinder the deployment of advanced telecommunications to Americans in rural and high cost areas. However, e.spire strongly supports the Commission's proposals to adopt additional collocation rules and to define additional or redefine existing unbundled network elements ("UNEs"). These steps will spur the deployment of advanced telecommunications capability by facilitating efforts of competitive exchange carriers ("CLECs") to deploy advanced telecommunications capability and achieve the purposes of the Telecommunications Act of 1996 ("1996 Act").[2]

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1 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking (rel. Aug. 7, 1998) [hereinafter "*MO&O/NPRM*"]. *See* Public Notice, CC Docket Nos. 98–146, 98–146, DA 98–1624 (rel. Aug. 12, 1998) (extending filing dates for comments and replies on the *NPRM*).

2 Pub.L. 104–104, February 8, 1998, *amending* the Communications Act of 1934 ("Act").

INTRODUCTION

e.spire firmly supports the Section 706 goal of ensuring the deployment of advanced telecommunications capability to all Americans and applauds the Commission for steps it already has taken in this regard through the opening of its Section 706 Notice of Inquiry (*"706 NOI"*)[3] and the issuance of its first Memorandum Opinion and Order in this docket (*"706 Order"*). As e.spire has commented previously, in response to the *706 NOI*, e.spire and other CLECs are ready, willing and able to deploy advanced telecommunications services wherever a market demand for such services exists. However, CLEC efforts to roll-out such advanced services have been seriously impeded by anti-competitive ILEC behavior. As explained below, e.spire respectfully submits that the purposes of Section 706 can best be achieved by derailing ILEC refusals to provide necessary unbundled network elements ("UNEs"), efficient collocation arrangements, and refusals to interconnect packet switched services – rather than by permitting the creation of ILEC nonregulated advanced services affiliates which cannot be "separate" in any true sense of the word. Finally, if the Commission elects to approve the creation of ILEC advanced services affiliates, e.spire believes strongly that much tougher measures than those proposed in the *NPRM* are required to preclude monopolistic abuses by the ILECs.

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[3] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry (rel. Aug. 7, 1998) [hereinafter *"NOI"*].

I. THE COMMISSION'S STATUTORILY UNFOUNDED ILEC ADVANCED SERVICES AFFILIATE PROPOSAL THREATENS TO RETARD COMPETITION AND THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY

(*NPRM*, ¶¶ 85-117)

e.spire appreciates both the Commission's frustration concerning ILEC delays in implementing Section 251(c) and the enthusiasm with which it has embraced its Section 706 task of encouraging the deployment of advanced telecommunications services. However, e.spire submits that the Commission's proposal to permit ILECs to establish advanced services affiliates free from ILEC interconnection, unbundling and resale obligations cannot be squared with the requirements of Sections 251 or 706.

A. Section 272 Does Not Provide an Appropriate Legal Basis on Which the Commission May Release an ILEC Advanced Services Affiliate from ILEC Regulation

(*NPRM*, ¶¶ 89-94)

In the *NRPM*, the Commission relies on Section 272, and its own implementation of that section in the *Non-Accounting Safeguards Order*, as a model for crafting a regulatory scheme whereby ILEC advanced services affiliates may be released from ILEC regulation.[4] This reliance is misplaced. Section 272 never was intended to apply to the in-region provision of advanced data services by an ILEC affiliate. Rather, the structural separation requirements of Section 272 and the *Non-Accounting Safeguards Order* are intended to govern the manner in which a Regional Bell Operating Company ("RBOC") affiliate may provide long distance services within the RBOC's local market once the local and long distance markets in its territory

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4 *MO&O/NRPM*, ¶¶ 89-94.

have been opened to competition.[5] Thus, Section 272 reflects congressional conclusions about the manner in which a RBOC may enter a mature, competitive long distance market only *after* the RBOC already has complied with Sections 251 and 271.

Accordingly, Section 272 provides little, if any, guidance regarding the appropriate conditions under which an ILEC that has complied with Section 251 may establish an in-region advanced services affiliate which itself would not be required to comply with Section 251(c).

B. The Commission Cannot Release Separate ILEC Affiliates from the Requirements of Section 251
(*NPRM*, ¶¶ 90-91)

The Commission's reliance on Section 251 as a basis for its proposals also is misplaced. The incumbency obligations of Section 251, as the Commission notes, will apply to any advanced services affiliate of the ILEC that qualifies as a "successor or assign" of the ILEC under Section 251(h)(1)(ii), and to those ILEC affiliates that occupy a position in the local market that is "comparable" to that of the ILEC.[6] Further, the FCC generally has concluded that an affiliate is not a "successor or assign" of an ILEC if it is "truly separate" from the ILEC – that is, as the Commission explains, if the affiliate does not obtain any "unfair advantage" from its relationship with the incumbent.[7]

By this simple definitional leap, the Commission has limited which providers will be classified as successors or assigns of an ILEC to *only* those affiliates that obtain an "unfair

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5 *See* 47 U.S.C. § 272; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21908 (1996) [hereinafter "*Non-Accounting Safeguards Order*"].

6 *MO&O/NRPM*, ¶¶ 90-91.

7 *Id.* ¶ 83.

advantage" from the ILEC. This approach, then, conveniently releases from the obligations of Section 251 advanced services affiliates that qualify as successors or assigns but receive only a "fair" advantage as a result of their relationship with the ILEC sibling or parent. e.spire respectfully submits that this is not a permissible interpretation of Section 251(h); indeed, the Commission's approach is plainly inconsistent both with that section and with the broader purposes of the 1996 Act.

C. Creation of a Truly Separate ILEC Advanced Services Affiliate is Not Practically Feasible and Would Impede the Continuing Development of the Telecommunications Network
(*NPRM*, ¶¶ 85-117)

Even if the Commission had the legal authority to authorize the creation of a separate ILEC advanced services affiliate not subject to Section 251, it simply is not possible to create truly separate ILEC affiliates that provide only advanced data services. Analog circuit-switched technology is fast giving way on all fronts to digital, packet-switched technology, which is resulting in the convergence of voice and data networks. It is now clear that the same digital network facilities that are used to provide advanced data services also may be used to provide a full range of voice telephony. Separate voice and data networks do not exist: data can travel over voice circuits, and voice can travel in cells or packets. Similarly, many specific pieces of equipment cannot be classified on the basis of whether they are used exclusively for the transmission of voice or data.

Accordingly, the Commission must be prepared to recognize that any so-called separate ILEC "data" affiliate established, as proposed in the *NRPM,* would be positioned to provide any retail telecommunications service – local, wireless, long distance, as well as advanced data services – on a largely deregulated basis. The only possible way to ensure that the data affiliates

provide *only* data services would be for the FCC and state regulators to monitor the operations of the data affiliates, constantly and exhaustively. e.spire observes that, in this context, similar efforts by regulators in the past to monitor and control the activities of ILECs and their affiliates largely have been unsuccessful. The Commission should not endeavor to establish such a regulatory-intensive advanced services scheme, which would be diametrically inconsistent with the mandates of the 1996 Act on multiple levels.

Finally, even if it reasonably were possible to maintain a true separation of voice and data services, the establishment of unregulated data networks – specifically, those not subject to the requirements of Section 251(c) – would distort the incentives for ILEC investment in advanced services network infrastructure. e.spire notes that so-called "separate" ILEC affiliates will have the same ultimate corporate parents, which inevitably will make determinations regarding where to deploy new equipment and new facilities. Faced with the choice, ILEC holding companies would undoubtedly allocate advanced facilities and equipment to an unregulated data subsidiary rather than to the regulated ILEC subsidiary, thereby avoiding the necessity of subjecting the advanced facilities and equipment to the interconnection, unbundling, and resale requirements of Section 251. This desire to shield these network investments from competitors would necessarily redound to the detriment of the existing public switched network and to rapid and widespread technological development of an advanced services network.

II. IF THE COMMISSION CANNOT BE DISSUADED FROM ADOPTING ITS ILEC ADVANCED SERVICES AFFILIATE PROPOSAL, RIGOROUS SEPARATION REQUIREMENTS AND SAFEGUARDS MUST BE ADOPTED AND ENFORCED (*NPRM*, ¶¶ 86, 92–117)

As discussed above, the establishment of separate ILEC advanced services affiliates to provide only data services is neither contemplated nor allowed for by the 1996 Act, and, moreover, is not practically feasible. However, in the event that the Commission decides to implement the proposals in the *NRPM*, it must ensure to the greatest extent possible that the advanced services affiliate is in fact "truly separate." Indeed, the Commission must take every step to ensure that these ILEC advanced services affiliates do not receive any advantages by virtue of their ILEC affiliations. Moreover, the Commission must adopt and enforce an absolute bar on discrimination by an ILEC in favor of such an affiliate. Only then will an ILEC advanced services affiliate be subject to the same competitive conditions facing CLECs.

In the *NRPM*, the Commission generally suggests that an ILEC data affiliate that "satisfies adequate structural separation requirements" and "acquires, on its own, facilities used to provide advanced services," does not qualify as an ILEC and need not be subject to the obligations of Section 251(c).[8] The Commission further states that compliance with seven "structural separation and nondiscrimination requirements," as set forth in the *NRPM*, will suffice to relieve an affiliate from ILEC status.[9] e.spire respectfully suggests that in order to ensure that an ILEC advanced services affiliate is "truly separate," and so be released from the

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8 *Id.* ¶ 92.

9 *Id.* ¶ 96.

obligations of Section 251, the Commission must establish separation and nondiscrimination requirements that are far more than merely "adequate."

The seven basic requirements set forth in the *NRPM* reflect the safeguards established by Section 272 for an RBOC's interLATA affiliate to provide in-region services. As discussed above, those provisions contemplate the operation of an ILEC affiliate in an environment where Section 251(c) has been fully implemented and the local market is open to competition. Because, as the Commission acknowledges in the *NRPM*, the "competitive" situation in the local markets is not, in fact, actually competitive,[10] the Section 272 model is insufficient to ensure the establishment and maintenance of truly independent advanced services affiliates. Thus, additional, more rigorous safeguards than those proposed in the *NRPM*, created to reflect the current state of competition in the local markets, are necessary to accomplish the Commission's stated goals of establishing ILEC advanced services affiliates that function as competitive carriers.

A. The Commission's Seven Structural Safeguards Must Be Strengthened and Modified in Order to Prevent Discriminatory and Anticompetitive Activity and to Make the Affiliate Function as a CLEC
(*NPRM*, ¶¶ 96-97)

1. Affiliates Must "Operate Independently" from Their ILEC Parents

First, the Commission has proposed that, to escape ILEC regulation, an ILEC advanced services affiliate must "operate independently" from the ILEC.[11] The Commission goes on to

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10 *Id.* ¶ 77.

11 *Id.*

specify that an independent affiliate may not jointly own with the ILEC any switching facilities or the land and buildings on which such facilities are located, and, further, that the ILEC "may not perform operating, installation, or maintenance functions for the affiliate."[12] e.spire agrees that these conditions are necessary in order for an ILEC advanced services affiliate to operate with any independence form the ILEC.

However, e.spire believes that additional requirements are necessary in order to ensure true operational independence. Specifically, in addition to restrictions on ownership of facilities, land, and buildings associated with switching equipment, the Commission should prohibit joint ownership of any telecommunications facilities or equipment, and of any interest in real property or physical space. e.spire sees no reason to distinguish switching capabilities or equipment from all other items; regardless of the nature of the ILEC asset involved, the advanced services affiliate would gain an advantage as a result of its relationship with the ILEC that is not available to competitors. Further, all administrative functions – such as payroll, procurement, personnel, legal, and the like – also must remain independent.

In addition, and perhaps most importantly, to avoid any consumer confusion between the ILEC and its affiliate, the Commission must prohibit the affiliate from engaging in joint marketing and advertising with the ILEC, and from using in any way the ILEC's brand name. Familiar ILEC brands and logos, and the power of an ILEC marketing campaign, are vestiges of monopolistic incumbency that would bestow a discriminatory competitive advantage on the ILEC subsidiary vis-à-vis its CLEC competitors, which by virtue of their position can *never* have access to such a valuable asset. e.spire also notes that merely requiring the affiliate to make a

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12 *Id.*

royalty payment to the ILEC for use of its brand will not solve this problem; any such payment would constitute no more than an internal transfer payment. Rather, the Commission should impose on the ILEC affiliate the same standard for misuse of an ILEC brand that would be imposed on a CLEC. That is, in any case where use by an unaffiliated entity of an ILEC brand would constitute trademark infringement, such use by an affiliate likewise should be prohibited.

2. Transactions Between ILECs and Advanced Services Affiliates Must Be at Arm's Length

e.spire agrees with the Commission's suggestion that all transactions between ILECs and their data affiliates should be on an arm's length basis, reduced to writing, and made available for public inspection. The affiliates should also be required to provide on the Internet a detailed written description of any asset or service transferred, as well as the terms and conditions of the transactions.[13] Ready access to these written agreements should help CLECs to ensure that, at least based on the language of the agreements, they receive treatment equivalent to that provided the data affiliates.[14]

Further, e.spire agrees that the Commission should require that all transactions between ILEC and its affiliate comply with the Commission's affiliate transaction rules.[15] e.spire hopes, as the Commission indicates, that the affiliate transaction rules would help to discourage, and facilitate detection of, improper cost allocations in order to prevent ILECs from imposing the costs of their unregulated ventures on ratepayers.

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13 *Id.*

14 e.spire emphasizes, however, that, regardless of the access CLECs have to the agreements between ILECs and their affiliates, e.spire does not believe that it truly is possible to ensure that ILECs do not discriminate in favor of their affiliates.

15 *MO&O/NRPM*, ¶ 96.

Finally, e.spire would suggest that it is necessary for the FCC to apply these affiliate transaction rules, as well as the nondiscrimination rule discussed below, not only in the context of transfers from the ILEC to the affiliate, but also from the affiliate to the ILEC. Without such a reciprocal obligation, the ILEC could avoid its own Section 251 obligations by locating essential facilities or equipment with its affiliate rather than with its local exchange operations, and then obtain access to the assets by resale from the affiliate. Allowing the ILEC to evade its Section 251 obligations as a result of such an arrangement not only would defeat the purpose of the proposals in the *NRPM*, but effectively would eviscerate the local competition provisions of the 1996 Act. Just as the affiliate must not benefit unfairly from the ILEC's incumbent status, so too must the ILEC not benefit unfairly from the affiliate's unregulated status.

3. Books and Accounts Must be Separate

As suggested by the Commission in the *NRPM*, the ILEC and its advanced services affiliate should be required to maintain separate books, records, and accounts.[16] Only a standard of completely separate bookkeeping can come close to ensuring that ILEC data affiliates do not have access to the vast resources of the ILEC.

4. ILECs and Advanced Service Affiliates Cannot Share Officers, Directors or Employees

For similar reasons, the ILEC and its affiliate must have separate officers, directors, and employees.[17] e.spire suggests, however, that the Commission go further and require that an advanced services affiliate have a substantial percentage of outside ownership that is different

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16 *Id.*

17 *Id.*

from ownership of the ILEC. Such an ownership requirement is a simple and effective means for the Commission to try to ensure that the ILEC and its affiliate truly are separate, and has several advantages. For example, if the ILEC affiliate has sufficient public ownership to have a fiduciary relationship in addition to that it has to its parent holding company, market pressures could help give the affiliate stronger incentives to earn a reasonable profit. Thus, the affiliate truly would be functioning independently rather than as an appendage of the ILEC.[18]

This approach has the advantage of ensuring some level of independence of the advanced services company from its ILEC affiliate. Correspondingly, this should alleviate some of the need for ongoing policing by federal and state regulatory bodies of ILEC and affiliate relations. Thus, it is a comparatively deregulatory approach that is entirely consistent with the 1996 Act, and requires less supervision and enforcement than other possible restrictions. It should be noted that this ownership restriction should not be considered as too strict or rigorous – as, indeed, should none of the other restrictions or requirements proposed by e.spire – because the creation of an advanced services affiliate is of course entirely voluntary in the first instance.

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[18] LCI International Corporation ("LCI") proposed this approach in a petition filed with the Commission earlier this year. *See generally Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings,* CC Docket No. 98-5 (filed Jan. 22, 1998) ("*LCI Petition*"). e.spire refers the Commission to the *LCI Petition* for a more detailed discussion of the proposal.

5. ILECs Cannot Extend Credit or Collateral for Advanced Services Affiliates

e.spire agrees with the Commission's proposal to prohibit the affiliate from obtaining credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the ILEC.[19] Again, e.spire would emphasize that in order for the Commission to fulfill its stated intention of ensuring that ILEC advanced services affiliates are positioned in the market as would be a CLEC. Allowing the ILEC affiliate access – or even the promise or possibility of access to – the ILEC's vast assets would allow the affiliate to derive an unfair advantage from its relationship with the ILEC and prevent true independence.

6. ILECs Cannot Discriminate in Providing Goods, Services, Facilities or Information to Advanced Services Affiliates

Although e.spire is not convinced of the feasibility of this principle, in its dealings with its advanced services affiliate the ILEC must be prohibited from discriminating in favor of the affiliate "in the provision of any goods, services, facilities, or information or in the establishment of standards."[20] In addition, as noted above, the Commission should make this nondiscrimination requirement reciprocal. ILEC advanced services affiliates must be prohibited from discriminating in favor of their ILEC siblings or parents in order to ensure that neither they nor the ILECs are able to avoid their statutory obligations.

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19 *MO&O/NRPM*, ¶ 96.

20 *Id.* ¶ 96; 47 U.S.C. § 272(c)(1).

In this context, e.spire urges the Commission to consider the importance of ensuring that ILECs be prohibited from discriminating in the provision of *any* information to its affiliate. To this end, specifically, customer proprietary information ("CPNI") must be included in the term "information" so as to receive the protections of any rules adopted in this proceeding. Section 272(c)(1) clearly prohibits RBOCs from giving their affiliates an information advantage as a result of the BOCs' traditional monopoly status. In the *Non-Accounting Safeguards Order*, the Commission determined that Section 272's nondiscrimination requirement, as it applies to RBOC provision of "information," includes CPNI.[21] e.spire believes that the same conclusion also is mandated in this proceeding.

Earlier this year, however, the Commission reversed its decision in the *Non-Accounting Safeguards* proceeding and effectively eliminated CPNI from the plain language of Section 272, claiming that Section 272 does not impose any obligations with respect to CPNI than those contained in Section 222.[22] In this instance, if the Commission truly wants to ensure that an ILEC advanced services affiliate does not have an unfair advantage because of its relationship with its ILEC parents, it must reverse its February decision so that CPNI is included as

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21 *Non-Accounting Safeguards Order*, ¶ 222.

22 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (rel. Feb. 26, 1998).

information subject to Section 272's nondiscrimination requirement, and extend that reasoning to ILECs and their advanced services affiliates.[23] Allowing an advanced services affiliate to obtain CPNI from its ILEC parent clearly would give it an information advantage that would defeat the FCC's goal of having ILEC advanced services affiliates function just like CLECs.

7. Advanced Services Affiliates Must Interconnect with ILECs on Terms and at Prices Available to CLECs

The Commission's seventh proposed requirement provides that an ILEC advanced services affiliate must interconnect with the ILEC pursuant to tariff or an interconnection agreement. The Commission also has suggested that the ILEC make available to unaffiliated entities all network elements, facilities, interfaces, and systems provided to the advanced services affiliate.[24] e.spire agrees with both of these proposals and believes their adoption is necessary to put competitors on an equal footing with the ILEC advanced services affiliate. Notably, by virtue of their ILEC affiliation, advanced service affiliates will be able to agree to volume commitments that no CLEC is able to meet. To prevent ILECs from using such volume commitments as a means to provide favorable terms and conditions to only their affiliates, e.spire submits that the Commission should not permit ILECs to vary terms and conditions offered to

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23 The Competitive Telecommunications Association has requested that the Commission reconsider its decision to reverse its decision to exclude CPNI from the protections of Section 272. See Competitive Telecommunications Association Petition for Reconsideration, CC Docket No. 96-115 (filed May 26, 1998) [hereinafter "*CompTel Petition*"]. e.spire supports the *CompTel Petition*, for the reasons stated therein.

24 *MO&O/NRPM*, ¶ 96.

their affiliates unless comparable volume commitments have been agreed to by no less than five CLECs who have entered into state commission approved interconnection agreements in the relevant state and have met those volume commitments for three consecutive months.

In addition, e.spire suggests that the Commission require that competitive unaffiliated entities be able to adopt either all *or any portion* of the interconnection agreements executed by ILECs and their separate advanced services affiliates. Without this option, ILECs would be able to enter into interconnection agreements with their affiliates that contain one or more so-called poison-pill provisions, which would then make the entire agreement disadvantageous to competitors. Any monetary disadvantage the ILEC affiliate might incur due to poison pill provisions ultimately would be shared among the various entities in the ILEC corporate family. Thus, essential ILEC elements or services would be protected from the nondiscrimination requirement at no effective cost to the ILEC. This would constitute blatant and unreasonable discrimination on behalf of the ILEC affiliate, and defeat the FCC's stated goals in this proceeding.

B. Structural Separation Rules Should Apply Regardless of the Size of the ILEC – These Rules Should Not Sunset
(*NPRM*, ¶¶ 98–99)

The Commission has sought comment on whether the same separation requirements should apply to all advanced services affiliates, regardless of the size of the associated ILECs.[25] The Commission notes that Section 251(f) provides exemptions from Section 251(c) obligations for certain rural and small LECs, which presumably could serve as models for some sort of *de*

25 *Id.* ¶ 98.

minimis exception in this proceeding.[26] e.spire suggests, however, that the goal of ensuring that *all* advanced services ILEC affiliates are treated exactly as competitive advanced services providers mandates that any separation requirements adopted be applicable to all advanced services providers, regardless of the size or location of the affiliated IEC. For similar reasons, the Commission should not adopt separation requirements for provision of intraLATA advanced services that are less stringent than those imposed by Section 272 on provision of interLATA advanced services.[27]

Further, the Commission should not now adopt a provision allowing these separation requirements to sunset after a certain period of time.[28] Quite simply, the FCC has no way of knowing whether the plan to allow the creation of separate ILEC advanced services affiliates will accomplish the goals articulated in the *NRPM*. As an alternative to a sunset period, the Commission could consider monitoring the status of competition in the advanced services market, and the relationship of the ILECs to their advanced services affiliates, on a regular basis.

C. ILEC Advanced Services Affiliates Should Be Required to File Access Tariffs (*NPRM*, ¶¶ 100, 116)

e.spire strongly disagrees with the Commission's proposal to classify as nondominant ILEC advanced services affiliates to the extent that they provide interstate exchange access their costs. By virtue of its association with the ILEC, the advanced services affiliate possesses market power, and hence tariffing and cost support should be the minimum requirements applicable to its provision of exchange access services. For similar reasons, the states should not

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26 *Id.*

27 *See Id.*

28 *See id.* ¶ 99.

services.[29] The pricing of interstate exchange access services by ILEC advanced services affiliates must be cost-supported in order to ensure that the affiliates are not under-recovering treat ILEC affiliates that provide intrastate advanced services as nondominant competitive carriers.

D. ILEC Advanced Services Affiliates Should Not be Eligible to Resell the ILECs' Services Pursuant to Section 251(c)(4)

(*NPRM*, ¶ 101)

One of the FCC's goals in this proceeding is to facilitate the development of competition in the local markets by increasing both the number and effectiveness of interconnection options available to CLECs lacking an ILEC affiliation. At the heart of this goal is the notion that, by application of the nondiscrimination provisions proposed herein, the ILEC will be required to make available to unaffiliated CLECs the types of interconnection offered to its advanced services affiliates. Unfortunately, if the affiliate resells ILEC services or otherwise structures its interconnection with the ILEC in a form that would not be useful to unaffiliated CLECs, the FCC's basic premise fails.

Thus, to ensure that its goal of expanding the range and effectiveness of interconnection and unbundling options available to CLECs is achieved, the Commission must not permit an ILEC advanced services affiliate to resell any services obtained from its parent. e.spire notes that none of the disadvantages inherent with resale as an option for CLECs is material to an ILEC's affiliate. For example, most CLECs disfavor resale as an option because, in addition to providing little and often no profit, it gives CLECs no way of distinguishing themselves from the underlying ILEC provider. An affiliate, by contrast, likely would benefit from any such

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[29] *Id.* ¶ 100.

confusion with its powerful ILEC parent or sibling. In addition, an ILEC affiliate probably would be indifferent to any unfavorable or prohibitive resale pricing. Resale between an ILEC and its advanced services affiliate effectively involves an internal transfer of funds. Clearly, under these circumstances, the ILEC affiliate and the CLEC are not similarly situated.

Accordingly, the Commission must require ILEC advanced services affiliates to obtain the capabilities they need to provide retail service through the purchase of UNEs. By eliminating resale as an option, the FCC would force the affiliate to bear the same economic incentives and disincentives that face unaffiliated CLEC providers. e.spire submits that this is the only method by which the Commission can attain its goal of ensuring that ILEC affiliates and CLECs function alike, and increasing the types of interconnection and UNEs available to CLECs.

E. Transfers of Any Assets Should Make An Affiliate an Assign (*NPRM*, ¶¶ 104-115)

As discussed above, the Commission tentatively has concluded that an ILEC's advanced services affiliate will not be subject to the requirements of Section 251 unless the affiliate qualifies as a successor or assign of the ILEC, or as a "comparable carrier."[30] However, the Commission also tentatively has concluded that certain transfers between the ILEC and the advanced services affiliate will transform the affiliate into a successor or assign of the ILEC.[31] Specifically, the FCC has suggested that any wholesale transfer of network elements used to provide advanced services that are subject to the requirements of Section 251(c)(3) would qualify the affiliate as an assign of the ILEC.[32] Similarly, the Commission suggested that the

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30 *Id.* ¶¶ 90-91, 104.

31 *Id.* ¶¶ 105-07.

32 *Id.* ¶ 106.

transfer of local loops from the ILEC to the advanced services affiliate would make the affiliate an assign and subject the affiliate to ILEC regulation.[33] e.spire concurs with each of these tentative conclusions.

The Commission has sought comment on what, if any, additional asset transfers could push the advanced services affiliate over the "successors or assigns" edge.[34] Quite simply, e.spire believes that *any* transfer, under any circumstances, from the ILEC to its affiliate, whether of equipment, facilities, real estate, information, personnel, or any other asset enumerated in the *Order/NRPM*, and regardless of where the asset is located, would subject the affiliate to regulation as an ILEC. e.spire submits that no advanced services affiliate could function just like a CLEC, and hence as a "truly separate" affiliate, if the ILEC were to establish the affiliate from the ground up with its own equipment or facilities, or to facilitate the affiliate's creation with monopoly incumbent revenues.

Accordingly, the Commission should not exempt, for any period of time, ILEC advanced services affiliate transfers from either the affiliated transaction rules or the nondiscrimination requirement proposed in the *Order/NRPM*.[35] For similar reasons the Commission should refrain from adopting any other exceptions – including, but certainly not limited to, any sort of *de minimis* exception -- to any restrictions imposed on ILEC transfers to their advanced services affiliates.[36] In short, in order for an ILEC advanced services affiliate to function like a CLEC, it must do so from inception.

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33 *Id.* ¶ 107.

34 *Id.* ¶ 113.

35 *See id.* ¶ 111.

36 *See, e.g., id.* ¶ 108.

III. REFORMED NATIONAL COLLOCATION RULES WILL PROMOTE LOCAL COMPETITION AND FACILITATE THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY
(*NPRM*,¶¶ 118–149)

The unavailability and exorbitant expense of physical collocation space in ILEC central offices is a substantial barrier to CLEC efforts to deploy advanced telecommunications capability. Increasingly, CLEC efforts to expand the coverage of their networks are being met by ILEC notifications that physical collocation space is exhausted. Even where collocation space is available, the intervals involved in obtaining use of the space can approach a year and up-front charges can total hundreds of thousands of dollars per location. As has been demonstrated recently in state proceedings, solutions to these problems are readily available, but generally ILECs are not willing to implement them voluntarily. e.spire, therefore, supports the Commission's establishment of minimum collocation standards to resolve the collocation crisis on a national basis.[37]

A. The Commission Should Require All ILECs Nationally to Offer the More Efficient Collocation Options Identified in State Proceedings
(*NPRM*, ¶¶ 118–125)

Under Sections 201 and 251 of the Act, the Commission unequivocally has the authority to establish national collocation standards in order to promote local competition and speed the deployment of advanced services.[38] State regulators have compiled an extensive record which

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37 *Id.* ¶ 124.

38 *Id.* ¶¶ 118, 123.

identify remedies to the lack of collocation space, as well as the exorbitant cost and delay involved with obtaining access to available space. e.spire respectfully submits that the Commission should adopt the solutions developed in these state proceedings on a national basis, so that CLECs can avoid the time-consuming and expensive process of repeating this effort in every state. In particular, e.spire commends the solutions being implemented in the states of New York and Texas. These states are leading the way in developing imaginative and effective collocation solutions, several of which are outlined below.

Extended Link. Currently, CLECs must establish collocation arrangements even if they intend to serve only a few customers located in an end office coverage area through use of unbundled loops. The need to establish costly collocation arrangements can be a substantial deterrent to expansion into areas that are not commercial centers. e.spire strongly supports efforts of the New York Public Service Commission ("New York PSC") to solve this problem by creating a new UNE known as the Enhanced Extended Loop ("Extended Link" or "EEL"). The extended link arrangement makes it possible for CLECs to reach customers through a single transmission facility composed of a loop, multiplexing, and transport that extends to the customer premise from the CLEC's point of interface. Through the use of Extended Links, CLECs are able to utilize collocation in one central office to serve end users via unbundled facilities derived from multiple end offices. This eliminates the need for CLECs to collocate in each and every end office and conserves scarce collocation space. In adopting national standards, the Commission should require ILECs to provide the Extended Link at cost-based rates, and without use restrictions, to support the provision of all telecommunications services. Such action will substantially further facilities-based CLECs efforts to deploy advanced telecommunications capability.

Shared Cages. The New York PSC is considering another form of collocation which would allow multiple CLECs to collocate in a single cage. Besides the obvious economies realized by sharing collocation space, shared cage arrangements are an attractive collocation alternative because they allow facilities-based CLECs to migrate customers easily from ILEC facilities to their own, as the customer's loop already is terminated at the CLEC cross-connect frame. e.spire strongly supports adoption of this collocation alternative. The Commission should specifically require ILECs to allow CLECs to share collocation space, *including space in existing collocation cages*.

Cageless Collocation. A number of states have considered requiring "cageless" collocation. A few ILECs also have voluntarily offered a cageless collocation arrangement voluntarily.[39] There are two general varieties of cageless collocation. Under one form, CLECs establish physical collocation arrangements in areas around the ILEC main distribution frame ("MDF").[40] Another form of cageless collocation (known as Separate Collocation Open Physical Environment, or "SCOPE" in New York) allows CLECs to collocate in a secured, but separate part of the ILEC central office. In a SCOPE collocation arrangement, there is no cage enclosure around an individual CLEC's equipment, and CLECs are responsible for the

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39 *MO&O/NPRM*, ¶ 139. e.spire notes that Covad Communications, a company that has executed a number of interconnection agreements with U S West that contemplate cageless collocation, has testified that U S West is backsliding on many commitments related to the cageless collocation arrangement. Collaborative session, NY Case 98-C-0690, *Proceeding on the Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements* (Sept. 14, 1998).

40 *See* Bell Atlantic-New York's Sept. 2, 1998, Draft Collocation With Escort Proposal, NY Case 98-C-0690.

installation and maintenance of their own equipment.[41] SCOPE also employs a point of termination bay that may be shared with other CLECs. The capacity of the bay can be expanded by adding increments to the frames on the bay. e.spire urges the Commission to promulgate national collocation rules requiring ILECs to make available cageless collocation arrangements modeled after those put in place by the aforementioned state commissions, which allow CLECs to install equipment at any point within an ILEC central office. The Commission also should clarify that CLECs will be permitted to install and perform routine maintenance on their collocated equipment without ILECs imposing the added cost of a line of sight escort, so long at the work is performed by an ILEC-approved contractor

Adjacent Collocation. Some states have approved adjacent collocation alternatives which serve as a viable option to direct collocation arrangements.[42] As with cageless collocation, there are two general varieties of adjacent collocation. With the first, "Adjacent On-Site Collocation," the ILEC builds a structure on the same property as the central office and permits CLECs to place their equipment in this structure. The ILEC then provides a connection for CLEC equipment to the MDF in the central office. The second form of adjacent collocation, "Adjacent Off-Site Collocation" involves the construction or rental by either the ILEC or CLEC of property near the central office, but not on the same property as the central office. Carriers establish a mid-span meet that connects the CLEC's equipment to the central office and the MDF

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41 *See* Revisions to New York Telephone Company's 914 P.S.C. Tariff, (filed July 23, 1998).

42 *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Comments of the DSL Access Telecommunications Alliance, CC Docket No. 98-146, pp. 14-15 (filed Sept. 14, 1998).

therein. Adjacent collocation provides CLECs with the same functionality as direct collocation but fewer problems to the extent that there is no worry about space being exhausted or about security concerns. Having this alternative available will give CLECs more opportunity to optimize the available collocation arrangements. Thus e.spire submits that the Commission should identify adjacent collocation as one of the options that must be made available to CLECs seeking physical collocation. Further, with respect to "adjacent off-site collocation," e.spire urges the Commission to make clear that the cost of the mid-span meet must be shared by the ILEC and the CLEC

Technically Feasible Alternatives. When one ILEC makes a new form of collocation available, e.spire submits that the Commission should endorse a very strong, but potentially rebuttable, presumption that the new form of collocation is technically feasible at other ILEC premises.[43] e.spire notes that there could exist in some rare instance a case where a collocation practice would not be transferable among ILECs. However, ILECs generally deploy essentially similar, if not identical, equipment throughout their networks, and thus, as a general rule, what is technically feasible for one ILEC is technically feasible for all ILECs.

Unrestricted Cross Connects Between Collocated CLECs. In any national collocation standards, the Commission expressly should note that ILECs may not limit a CLECs effort to cross-connect collocated equipment - either within the same collocation area or between different areas of the same central office. Many ILECs, such as Bell Atlantic, will not permit CLECs to cross-connect equipment collocated on different floors of a central office. Instead, CLECs must

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43 *Id.* ¶ 139.

pay the ILEC for cabling, racking, and installation at the ILEC's tariffed rate, which typically is much more expensive than what it would cost the CLECs to do the work themselves. The Commission should reject any such limit on cross-connection and adopt rules similar to those promulgated by the Texas PUC, under which CLECs may install their own cross-connections, even in instances where two CLEC collocation arrangements are located on separate floors or are otherwise noncontiguous.[44] As is the case in Texas, the rules also should specify that the CLECs *themselves* should be allowed to perform all installation associated with the cross connects.

Resolution of Collocation Disputes. In the absence of an effective enforcement mechanism, even the best collocation rules will not speed the deployment of advanced technologies. Therefore, the Commission should clarify that the FCC's new accelerated docket will have jurisdiction over ILECs and CLEC collocation disputes. [45]

Provisioning Intervals/Liquidated Damages for Missed Intervals. Base-line provisioning intervals should be included in any Commission collocation standards. At present, e.spire suggests that the Commission adopt the provisioning intervals established by the New York PSC. e.spire feels that the New York intervals strike a reasonable balance between the CLEC need to obtain access to collocation space and the ILEC need to have a reasonable amount of time to deliver collocation space. To encourage ILECs to meet Commission-set provisioning deadlines, e.spire recommends that the Commission endorse liquidated damages rules, similar to

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44 Public Utility Commission of Texas, Arbitration Award, Issue No.34, *Petition of MFS Communications Company Inc. for Arbitration of Pricing of Unbundled Loops,* Docket No. *16189 et al.* (Sept. 30, 1997).

45 *See In the Matter of Implementation of the Telecommunications Act of 1996 - Amendment of Rule Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers,* CC Docket No. 96-238, Second Report and Order (rel. July 14, 1998).

those promulgated by the Texas PUC, for use in cases where an ILEC fails to meet provisioning deadlines.

B. ILECs Should Be Required to Drop Unreasonable Restrictions on the Types of Equipment that Can Be Collocated
(*NPRM*, ¶¶ 126–135)

Increasingly, ILECs are using restrictions on the types of equipment that can be collocated as a way to prevent CLECs from employing efficient network architectures. Therefore, espire strongly supports the Commission's tentative conclusion that "incumbent LECs should not be permitted to impede competing carriers from offering advanced services by imposing unnecessary restrictions on the type of equipment that competing carriers may collocate."[46] The Commission should modify its collocation rules to provide that any equipment that contains routing, aggregating, or multiplexing functionality, including remote switching modules, frame relay switching equipment, DSLAMs and IP routers, may be collocated in the central office.

Fine distinctions between equipment which is capable of switching versus aggregation, or basic versus enhanced services functionality, are increasingly infeasible. Remote switching capabilities often are inherent in modern subscriber line concentration equipment, and precluding collocation of such equipment – or requiring the disabling of some of its capacity – is to stand in the way of technological progress. Similarly, as telephony migrates from circuit-switching to packet-switching, regulatory fiats preventing collocation of equipment with enhanced services capabilities will stifle technological innovation. Thus, e.spire respectfully suggests that ILECs should be required to permit collocation of any equipment necessary to provide any

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46 *MO&O/NPRM*, ¶ 129.

telecommunications *or* enhanced service.[47] To the extent that any restrictions are placed on such equipment, the restrictions should be based on the size, not the functionality, of the equipment.

e.spire also agrees with the Commission's tentative conclusion that all equipment placed on ILEC premises be compliant with NEBS technical standards. However, e.spire does not support the requirement that equipment meet NEBS *performance* requirements.[48] e.spire agrees that by requiring CLECs to meet NEBS performance requirements in addition to NEBS safety requirement, ILECs could unilaterally impose unreasonable, costly and burdensome requirements upon CLECs. Therefore, the Commission should clarify that CLECs need meet only NEBS safety requirements.[49]

C. ILECs Should Be Required to Discontinue Unnecessary and Anticompetitive Collocation Requirements
(*NPRM*, ¶¶ 136–149)

CLEC efforts to collocate have been frustrated unreasonably by unsupported ILEC claims that space is exhausted and by arbitrary ILEC security requirements. e.spire again urges the Commission to look to the "best practices" of the states, and adopt them on a national basis.

1. Space Availability and Space Exhaustion

Regarding space availability, e.spire strongly supports the Commission's tentative conclusion that ILECs "should . . . allow any competing provider that is seeking physical

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47 However, e.spire agrees with the Commission's conclusion that to the extent that the central office will accommodate only one carrier, the ILEC's advanced service affiliate should not be allowed to collocate its switching equipment.

48 *Id.* ¶ 134, n. 250.

49 *Id.* ¶135, n. 253.

collocation at the LEC's premises to tour the premises" to confirm space exhaustion.[50] e.spire similarly supports the Commission's tentative conclusion that ILECs must provide CLECs with information on the availability and use of collocation space in ILEC end offices.[51]

Requiring ILECs to report on space utilization will aid CLECs in developing collocation plans. In instances where space is not available in a CLEC's central office of choice, the CLEC will know to apply for a virtual collocation arrangement, collocate in a nearby central office, or perhaps attempt to negotiate a subleasing arrangement with a CLEC in a specific central office. Accurate, publicly available summary reports on collocation space utilization will enable CLECs to identify the central offices in which they collocate.

The Commission similarly should affirm efficient space utilization rules for collocation arrangements. With the availability of collocation space becoming an increasingly important issue to ILECs and to CLECs, the Commission should continue to enforce existing collocation space utilization rules and expand these rules to require ILECs and CLECs to report on space utilization, and the Commission should make summary-level *(i.e.,* no companies need be identified by name) utilization reports publicly available. Requiring ILECs and CLECs to report space utilization rates will ensure that scarce collocation space is used efficiently.

Space utilization reporting should mitigate space warehousing problems. If industry consolidation continues at its rapid pace, some companies could end up possessing very large amounts of collocation space in some central offices, and it may be the case that the CLEC could consolidate its collocation equipment into a smaller area if the space were used efficiently. If a

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50 *Id.* ¶ 146.

51 *Id.* ¶ 147.

CLEC is not utilizing its space efficiently according to Commission rules, the CLEC should either sublease a portion of the space to another CLEC or turn the space back over to the ILEC.

2. Security Measures

The Commission should reject any effort of ILECs to impose artificially high security costs onto CLECs for collocation. ILECs oftentimes require CLEC technicians to be escorted by ILEC personnel when accessing a CLEC's collocated equipment for maintenance or similar purposes. e.spire submits that requiring escorts is needlessly expensive and time consuming, especially in cases where an escort has to be dispatched from a distant ILEC central office. The Commission should expressly state that it disfavors ILEC escort requirements, and instead incent ILECs to utilize less costly security measures.

e.spire suggests that the Commission find that security escorts are unnecessary in cases where a central office could be equipped with automated security card reading systems. These systems are readily available, and are relied upon heavily by many ILECs to track who enters and leaves a central office. Additionally, e.spire notes that simple video camera technology could be used to monitor the activities of any CLEC technician entering an area where equipment is stored, and moreover, contractual indemnification could protect ILECs from any potential security problems as well as encourage CLECs to comply with ILEC security methods of procedure.

D. Reform of Rules Governing Space Preparation Charges is Required (*NPRM*, ¶¶ 123-124)

e.spire strongly urges the Commission to adopt minimum national standards regarding ILEC recovery of nonrecurring costs for collocation, including central office site preparation. In defining minimum standards, the Commission should state a clear presumption against

individual-case-basis ("ICB") or to-be-determined ("TBD") prices. In e.spire's experience, ICB and TBD prices often end up being hidden charges that can greatly increase the cost of collocation.

e.spire also submits that national standards specifically should preclude ILECs from passing through the entire cost of collocation space preparation to the first CLEC to occupy a portion of a collocation area. When an ILEC reconditions space for collocation, it typically installs costly HVAC and power generation equipment. While this equipment is designed to serve many collocators, standard ILEC practice is to charge the initial collocator for the total cost associated with space reconditioning, even where the initial collocator will use only a tiny portion of the available collocation space. Theoretically, the initial collocator gets compensated by other collocators entering the space over time; however, in practice, this cost recovery mechanism is exceedingly difficult to administer and acts as a very serious barrier to entry.

Recognizing the high costs and anticompetitive effects of traditional cost recovery for collocation space preparation, the New York PSC has ruled that Bell Atlantic may charge the initial collocator no more than its *pro rata* share of space preparation costs. In its ruling on this issue, the New York PSC noted:

> In order to remove [space reconditioning as a] competitive barrier to entry, BA-NY will be directed to pay for all special construction costs, except for the initial [telecommunications carrier's] proportionate share of such charges. The need for special construction is likely to become more prevalent. Special construction will be a significant, routine cost for all [telecommunications carriers] and should thus be part of the basic floor space rate.[52]

e.spire submits that the Commission should adopt the cost recovery mechanism used in

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[52] New York Public Service Commission, *Order Directing Tariff Changes for Non-Price Terms and Conditions for Collocation,* Case No. *95-C-0657 et al.* (Mar. 2, 1998).

New York for reconditioned space, and permit ILECs to recover only the *pro rata* share of reconditioning costs from the initial collocators. Doing so will avoid the difficulties of administering credits from the ILEC to the initial collocator and also help limit reconditioning as a barrier to entry.

E. Rules Must Preclude Preferential Collocation Arrangements for ILEC Advanced Services Affiliates
(*NPRM*, ¶ 148)

Regarding nondiscriminatory treatment, e.spire supports the Commission's tentative conclusion that ILECs that establish advanced services affiliates "must allow competitive LECs to collocate equipment to the same extent as the incumbent allows its advanced services affiliate." As the Commission notes, any lesser standard would violate the nondiscrimination provisions of the Act. In the virtual collocation context, however, e.spire believes that allowing an ILEC data affiliate to enter a virtual collocation arrangement with its ILEC parent would encourage discriminatory treatment in favor of the ILEC data affiliate. In virtual collocation arrangements, the ILEC maintains complete control of the collocator's equipment, and this degree of control of the ILEC data affiliate's equipment would produce an unmitigated opportunity for preferential treatment that e.spire believes would be undetectable. Thus, virtual collocation should not be permitted between and ILEC data affiliate and its parent.

IV. DEFINING ADDITIONAL UNES AND CLARIFYING EXISTING UNBUNDLING REQUIREMENTS WILL PROMOTE LOCAL COMPETITION AND ACCELERATE THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY
(*NPRM*, ¶¶ 150–178)

e.spire supports the Commission's efforts to ensure that the competitive industry has adequate access to the "last mile." The Commission's reiteration of its longstanding

requirements that (1) ILECs must provide unbundled access to two and four wire loops that are conditioned to support xDSL and other advanced technologies, and (2) ILECs must "take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities" is a welcome development that should relieve ILECs of any uncertainty with regard to their obligation to provide competitors with unbundled access to conditioned loops.[53] Consistent with its Section 706 mandate, the actions taken by the Commission in its initial *706 Order* have made clear that advanced facilities and services are subject to the cost–based interconnection and unbundling and avoided–cost resale requirements of Section 251(c).[54] In its *NPRM*, the Commission also reiterated that ILECs may not refuse to provide advanced loops to CLECs on the grounds that they do not provide advanced services themselves and it also made clear that CLECs can use its accelerated docket procedure to seek remedies for violations of the Commission's unbundling requirements.[55] e.spire supports and applauds the Commission for taking each of these steps. However, the Commission is right to recognize that it has both the authority and mandate to do more.[56]

A. Minimum National Standards Should Evolve to Reflect Experience Gained Over the Past Two Years
(*NPRM*, ¶¶ 152–156)

National rules. e.spire supports the Commission's conclusion that minimum national unbundling standards will continue to support the development of local competition and the

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53 *Id.* ¶ 152.

54 *Id.* ¶ 52.

55 *Id.* ¶¶152, 157.

56 *See id.* ¶¶ 154–155.

deployment of advanced telecommunications capability. The Commission's current loop definition properly focuses on functionality rather than technology. However, guidance on how this rule applies and the obligations it entails would be helpful to competitors and incumbents alike. In particular, e.spire agrees with the Commission that additional guidance is needed with respect to loops passing through remote terminals. e.spire also supports the Commission's numerous proposals to adopt additional unbundling rules designed to remove barriers and ensure access to loops that are essential to competitors' efforts to offer and deploy advanced telecommunications services and facilities.

Significantly, e.spire notes that the Commission's authority to define network elements and require unbundling, as well as its ability to do so based on facilities, functions, or both, recently has been upheld by the United States Court of Appeals for the Eighth Circuit.[57] e.spire respectfully submits that the Commission should use its clear authority to define network elements and require unbundling to establish an "extended link" UNE. e.spire's use of the extended link in BellSouth territory, and the New York PSC experience working toward developing it as a UNE, demonstrate that extended link provides an important functionality that can maximize the number of customers that can be served from one collocated end office and minimize space demands in others.

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57 *Southwestern Bell Tel. Co. v. FCC*, 1988 WL 459536 (8th Cir. Aug.10, 1998) ("Pursuant to section 251 (d)(2), it is within the authority of the FCC to determine which of these network elements – *the facilities, functions, or both* – incumbent LECs must make available on an unbundled basis." (emphasis added)).

B. Loop Inventory and OSS
(*NPRM*, ¶¶ 157–158)

The Commission already has established that ILECs must provide nondiscriminatory access to OSS for all loops.[58] It also has determined that "an incumbent LEC does not meet the [OSS] nondiscrimination requirement if it has the capability to electronically identify xDSL–capable loops, either on an individual basis or for an entire central office, while competing providers are relegated to a slower and more cumbersome process to obtain that information."[59] However, in recognition of the ILECs' uniform inability or unwillingness to comply with their OSS obligations, e.spire believes that the Commission should clarify that nondiscriminatory access to loop information regarding physical specifications, including loop type, length, conditioning and electronics already in place, is required.

If ILECs have such information, it should be consolidated into a "loop inventory" and shared it via OSS, web–site posting or providing requesting carriers with an electronic version on diskette. To facilitate the deployment of advanced telecommunications capability and accelerate the roll–out of competitive advanced service offerings, the Commission should require ILECs to update loop inventories on no less than a monthly basis.

e.spire also requests that the Commission adopt the following principles as rules regarding the way in which ILECs charge for such information. First, if an ILEC already has the

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58 *MO&O/NRPM*, ¶ 152, 157-158.

59 *Id.* ¶ 56.

information requested it should be able to charge competitors no more than nominal fee to recover the cost of making it available electronically. Second, if an ILEC has the ability to obtain the requested information electronically and without the dispatch of engineers or technicians, it should not be permitted to impose dispatch charges on its competitors. Third, the charge for loop conditioning information should be cost-based and nonrecurring. Finally, if an ILEC does not charge its advanced services end users a similar nonrecurring charge, it should not be permitted to impose one on CLECs.

C. Loop Spectrum Management
(*NPRM*, ¶¶ 159–162)

With the proliferation of xDSL and the development of other advanced technologies that allow multiple channels to be derived from a single loop, e.spire believes that spectrum management issues will become increasingly important. To ensure the smoothest and widest possible roll–out of this kind of advanced telecommunications capability, e.spire believes that the Commission should establish appropriate loop spectrum management rules today. These rules should apply equally to incumbents and new entrants.

Some rules, particularly those regarding interference, necessarily will require input from industry standards setting bodies and equipment manufacturers. e.spire suggests that the Commission can move this process along most effectively by adopting a collaborative approach similar to the one being used by the New York PSC in its continuing Section 271 proceedings.

Other rules, however, can be adopted in this rulemaking. Most importantly, e.spire believes that the Commission should make clear that two different service providers can offer

services over the same loop, with one carrier proving voice and the other providing data over different frequencies. This arrangement is technically feasible and it will serve to expand consumer choice and options while promoting the deployment of advanced data technologies. Accordingly, the Commission should adopt unbundling rules that: (1) require ILECs to unbundle loop voice and data channels but do not require competitors to purchase both; and (2) allow CLECs to sell loop channels back to the ILEC or another competitor. In conjunction with these unbundling rules, the Commission also should make clear that ILEC voice services still are subject to the resale requirement of Section 251(c)(4), even in cases where a CLEC seeking to resell the ILEC's voice service provides data service over the same loop on an unbundled basis. Finally, with respect to any ILEC advanced services affiliates the Commission may authorize, e.spire supports the Commission's tentative conclusion that any voice product that the ILEC provides to its advanced services affiliate must be made available to CLECs on the same terms and conditions. In this regard, e.spire reiterates two positions discussed above: (1) ILEC advanced services affiliates should not be permitted to resell ILEC services; and (2) ILECs and their affiliates cannot create favorable terms and conditions on the basis of volume commitments that most, if not all, CLECs cannot meet.

D. Loop Technical Standards
(*NPRM*, ¶ 163)

e.spire supports the Commission's tentative conclusion that it should adopt national technical standards for attaching electrical equipment (such as modems and multiplexers) on the central office end of loops. As noted by the Commission; ILECs currently set their own standards, which imposes unnecessary costs, delays and uncertainty on CLECs. Here, too, input from industry standards setting bodies and equipment manufacturers may be required and a collaborative approach probably will be most effective. Until such a process is completed,

however, e.spire submits that Commission should establish a rule forbidding ILECs from establishing requirements that exceed those already established by industry fora and equipment manufacturers.

E. Unbundling Loop Functionalities Necessary for the Deployment of Advanced Services
(*NPRM*, ¶¶ 164, 167–68)

The Commission's rules currently provide that:

> The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and end user customer premise."[60]

As indicated above, e.spire believes that this definition properly focuses on functionality rather than technology. Because loop technologies will continue to evolve, e.spire believes that it would be unwise to stray from a functional approach to defining UNEs.

Instead, e.spire submits that Commission should provide additional guidance, in the form of complementary unbundling rules, setting forth how this definition applies and the obligations it entails. To promote local competition and facilitate the deployment of advanced telecommunications infrastructure, the Commission also should define an extended link UNE and require subloop unbundling for loops passing through remote terminals. Each of these actions will provide competitors with additional opportunities to compete and consumers with additional choices in voice and advanced service providers.

1. ILECs Currently Must Offer Four Basic Loop Types: Two Wire Analog, Four Wire Analog, Two Wire Digital, Four Wire Digital

Currently, there are four basic types of loops deployed in ILEC – and, for that matter, CLEC --

networks. They are: two wire analog, four wire analog, two wire digital, and four wire digital loops. Effective local competition and timely advanced telecommunications infrastructure deployment depend on the ubiquitous availability of each of these loop types. Thus, e.spire submits that the Commission should adopt a rule establishing that all four types of loops must be made available on an unbundled basis.

Because ILECs currently pad their loop prices through the use of fancy labels such as ISDN and ADSL loops (typically, without providing the electronics that actually would make, for example, a four wire digital loop an "ADSL loop"), e.spire submits that the Commission should adopt a rule that requires ILECs to classify their loops as one of the four types listed above. With these classifications in place, the Commission then should adopt a uniform national framework for imposing unbundled loop recurring and nonrecurring charges. Consistent with current law, the rule should specify the manner – but not the amount – in which an ILEC can impose recurring and nonrecurring charges associated with its provisioning of each of the four loop types. e.spire firmly believes that such action significantly will diminish an ILEC's ability to inflate its competitor's costs of obtaining access to loops necessary to provision both traditional voice and advanced broadband services.

Specifically, e.spire submits that, for loops that are not equipped with electronics, ILECs should be permitted to impose *recurring* charges only on the basis of whether a loop is a two or four wire loop. For loops that require conditioning – digital two wire and digital four wire loops – ILECs should be allowed to impose a *nonrecurring* conditioning charge only, if they impose a similar charge on their own end users. In cases where a CLEC wins a customer away from an

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60 47 C.F.R. § 51.319.

ILEC and elects to serve that customer with an unbundled loop that already has been conditioned for the ILEC's prior use, the ILEC should not be allowed to impose a nonrecurring charge on the CLEC, as it already will have had the opportunity to recover its conditioning costs from its own end user. For loops that are equipped with electronics, ILECs may adjust the applicable recurring loop charge consistent with individual state commission cost-based pricing rules.

2. ILEC Loop Electronics Must Be Unbundled as Part of an Electronically-Equipped Loop

As indicated in the preceding section, e.spire believes that ILECs must offer loops equipped with electronics (*e.g.*, ADSL-equipped loops) on an unbundled basis. Thus, e.spire submits that the Commission should clarify that ILECs must offer unbundled loops capable of supporting advanced digital electronics *and* loops equipped with such electronics, if they already have such equipment in place. This requirement not only is technically feasible, it is consistent with the Commission's existing loop definition which defines the loop without reference to specific equipment or technology deployed in delivering that functionality. Because that definition does not contemplate, and the Commission's rules do not otherwise permit, an ILEC's stripping-away of electronics so that it can diminish the functionality of unbundled loops it provides to its competitors, the Commission should prohibit ILECs from doing so, unless the competitor seeks access to the loop without electronics.

Although, if adopted, the Commission's ILEC advanced services affiliate proposal certainly will limit the availability of unbundled electronically-equipped loops, e.spire submits that, consistent with the broad goals of the 1996 Act, the Commission should provide competitors with every possible opportunity to compete. Indeed, if the Commission wisely were to forego adopting its ILEC advanced services affiliate proposal, the availability of electronically-equipped loops, in addition to electronically-capable loops, could afford competitors with significant opportunities to broaden the reach of their advanced service offerings. In this environment, ILEC advanced services offerings also would be available for resale, thus providing competitors with all three methods of entry into the advanced services market and the field-leveling opportunity to share in an incumbent's economies of scale that are

no less present with respect to the deployment of loop electronics than they are with respect to any other part of an ILEC network.

3. Extended Link Should Be Defined as a UNE

As indicated above in e.spire's separate discussions of the need for efficient collocation practices and the utility of evolving national rules, e.spire believes that the Commission should define extended link as a UNE. e.spire's use of the extended link in BellSouth territory and the New York PSC's experience working toward developing an extended link UNE demonstrate that it provides an important functionality – composed of loop, multiplexing and transport – that can maximize the number of customers that can be reached through a single collocation arrangement. Thus, in addition to alleviating space constraints in ILEC end offices, unbundled access to such functionality also will accelerate and expand competitors' roll-outs of both traditional voice and advanced services offerings.

In light of the Eighth Circuit's recent shared transport decision, in which it upheld the Commission's functional approach to defining UNEs, there is no doubt that the Commission has the requisite authority to define the functionality offered by an extended link arrangement as a single UNE. Notably, an extended link does not provide an end-to-end service, as it must be combined with a CLEC's own switching equipment. Thus, adopting an extended link UNE cannot be challenged on the basis that it blurs the line between cost-based unbundling of network elements and avoided-cost resale of retail services.

To ensure that defining an extended link UNE will have its intended effect, e.spire submits that the Commission should preempt ILEC attempts to limit its usefulness by refusing to incorporate loops and transport capable of supporting advanced applications. For example, extended links that incorporate four wire digital loops and fiber transport will be most useful to

CLEC's seeking to expand their broadband services offerings. Thus, consistent with the Commission's task under Section 706, this new national minimum unbundling rule should require ILECs to offer extended links for all loop and transport types. Moreover, because the functionality defined does vary on whether the loop component of the extended link UNE employs "home run" copper or a DLC configuration, ILEC attempts to limit access on the basis of that technology-based distinction – or any other – also should be prohibited.

4. Enforcement and Nondiscrimination

As with any other complaints regarding an ILEC's compliance with the Commission's unbundling rules, e.spire believes that the Commission has the requisite jurisdiction to hear and adjudicate such disputes. To maximize the effectiveness of its newly established "rocket docket," e.spire believes that the Commission preemptively should strike ILEC arguments that all such disputes must allege violations of state commission-approved interconnection agreements and, as a result, can only be heard by state commissions. Such arguments are baseless and already have wasted far to much of the Commission's and competitors' resources in Commission mediated settlement negotiations that currently are taking place in anticipation of the October 5, 1998 start date for the accelerated docket.

Another issue that is raised at various points in the *NPRM* is whether an ILEC should be able to discriminate in favor of its own advanced services affiliate. For example, in paragraph 168, the Commission seeks comment on whether any loops provided by ILECs to an affiliate must also be provided to CLECs. Clearly, the answer to these questions must be that ILECs cannot offer their affiliates favorable treatment, in any way. To limit the potential damage that could be done by freeing ILECs to launch operations outside the scope of Section 251(c), before they have demonstrated compliance with that section, the Commission must

establish and enforce an absolute prohibition on discrimination. In such a context, there simply can be no such thing as "reasonable" discrimination.

F. Unbundling Loops Passing through Remote Terminals (*NPRM*, ¶¶ 169–172)

e.spire commends the Commission for affirming that ILECs must provide unbundled access to "high-speed data-compatible loops whether or not a remote concentration device like a digital loop carrier is in place on the loop."[61] e.spire also supports the Commission's tentative conclusion that "providing an xDSL-compatible loop as an unbundled network element is presumed to be 'technically feasible' if the incumbent LEC is capable of providing xDSL-based services over that loop" and that "the incumbent LEC shall bear the burden of demonstrating that it is not technically feasible to provide requesting carriers with xDSL-compatible loops." To avoid an exercise in nomenclature-based ILEC maneuvers to limit the effectiveness of this conclusion, e.spire submits that the Commission should make clear this conclusion is not in any way limited by the use of the term "xDSL" – if an ILEC uses a conditioned digital loop for its own services, it must be technically feasible to provide access to that same loop on an unbundled basis.

In light of these conclusions, e.spire believes that the Commission correctly has recognized the need to address technical issues arising from provision of loops over remote concentration devices such as a digital loop carrier ("DLC"). In this regard, e.spire submits a "concrete solution" to address a particular technical issue raised concerning ILEC deployment of integrated digital loop carriers ("IDLCs"). Because IDLC-delivered loops bypass the distribution frame and terminate at the ILEC switch, they must be multiplexed before being

handed-off to a CLEC. e.spire submits that ILECs can handle this task either by adding multiplexing before the switch or by using the switch itself to perform the multiplexing necessary to deliver the loop. Because the latter solution involves the use of ILEC "switching" equipment without the use of the switching functionality, the Commission should indicate that ILECs are not permitted to impose a charge for unbundled switching in this context. Once again, it is the functionality and not the specific technology or equipment that should guide the Commission's unbundling decisions.

Consistent with this rationale, e.spire supports the Commission's tentative conclusion that CLECs should not be comparatively disadvantaged by an ILEC's deployment of remote DLC systems.[62] Accordingly, e.spire agrees with the following tentative conclusions reached by the Commission:

- If a technically feasible solution to provide xDSL-based service to a customer presently served by a DLC-delivered loop is bypass by additional copper infrastructure, an ILEC or its advanced services affiliate should not be able to avail itself of that option while denying or delaying that option to a CLEC.[63]

- If an ILEC or its advanced services affiliate provides xDSL-based services through the use of a DSLAM at the remote terminal, a CLEC must be able to avail itself of that option, either through the use of the ILEC's DSLAM or its own DSLAM collocated at the remote terminal.[64]

- ILECs must make available, in a nondiscriminatory manner, to CLECs the same methods that the incumbent or its advanced services affiliate uses to provide advanced telecommunications capability, including xDSL services.[65]

- An ILEC must provide a CLEC with the same loops it provides to itself or to its

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61 *Id.* ¶ 167.
62 *Id.* ¶ 172.
63 *Id.*
64 *Id.*
65 *Id.*

affiliate, regardless of whether the loop is "home run" copper or one that passes through a remote terminal.[66]

- Deployment intervals for provisioning xDSL-compatible loops should be the same for ILECs and CLECs regardless of whether the loop passes through a remote concentration device.[67]

There is no doubt that, by incorporating each of these conclusions into its rules, the Commission significantly will promote competitive access to loops capable of supporting advanced broadband services.

G. Subloop Unbundling
(*NPRM*, ¶¶ 173–176)

e.spire submits that extension of the concept of loop unbundling to subloop elements is consistent with the pro-competitive goals of the 1996 Act and will promote the deployment of advanced telecommunications capability. Accordingly, e.spire supports the adoption of a rule that would require ILECs to offer subloop components (feeder plant, concentration device, distribution plant) as UNEs, and that would require ILECs to allow collocation at subloop points, such as controlled environmental vaults and above-ground cabinets. If the Commission adopts its ILEC advanced services affiliate proposal, e.spire agrees with the Commission's conclusion that it would be an unreasonable practice for an ILEC to deny CLECs collocation while allowing its affiliate to collocate at the remote terminal. If, in specific circumstances, subloop unbundling is not technically feasible or there is insufficient space at the remote terminal, e.spire believes that ILECs should be obligated to provide an alternative unbundling method at no greater cost to the CLEC. In such circumstances ILECs should be required to demonstrate that the alternative

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66 *Id.*

67 *Id.*

unbundling method will provide the CLEC with loop of the same quality and functionality as the loop that the CLEC would have assembled through access to sub-loop elements.

H. Additional Unbundling Considerations
(*NPRM*, ¶¶ 180–183)

To promote competition in general and the proliferation of competitive advanced service offerings in particular, e.spire urges the Commission to refrain from establishing any rules that would limit access to UNEs used for provisioning advanced services. Indeed, it seems unlikely that any of these UNEs could be characterized as being "proprietary" as defined in Section 251(d)(2), as all or nearly all equipment deployed in ILEC networks is purchased "off-the-shelf" from equipment manufacturers. Additionally, it also seems unlikely that there are any "advanced" network elements that are incapable of being unbundled. Indeed, unbundled access to elements such as individual packet switches is both technically feasible and necessary for CLECs, such as e.spire, to develop networks of interconnected packet switched networks.

V. ADVANCED ACCESS SERVICES OFFERED TO END USERS SHOULD BE SUBJECT TO THE RESALE REQUIREMENT OF SECTION 251(C)(4)
(*NPRM*, ¶¶ 185–189)

e.spire agrees with the Commission's tentative conclusion that, advanced services offered by ILECs to residential or business customers or to Internet service providers should be subject to the resale requirements of Section 251(c)(4). Indeed, the plain language of that section makes no other conclusion possible. Section 254(c)(4) explicitly imposes on ILECs the obligation to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[68] e.spire concurs in the Commission's analysis that advanced services generally offered by ILECs to subscribers who are not telecommunications

carriers generally meet this test. Thus, e.spire also agrees with the Commission's tentative conclusion that such advanced services "are fundamentally different from the exchange access services that the Commission referenced in the *Local Competition Order* and concluded wee not subject to section 254(c)(4)."[69]

VI. RBOC INTERLATA RELIEF IS NEITHER NECESSARY NOR APPROPRIATE AT THIS TIME

(*NPRM*, ¶¶ 190–196)

In light of its Section 706 duty to encourage the deployment of advanced telecommunications services, the Commission has requested comment regarding its authority to grant "targeted" interLATA relief by either modifying LATA boundaries pursuant to Section 3(25)(B).[70] e.spire submits that, while both this provision grant the Commission limited authority over LATA boundaries, this authority is to be construed narrowly and cannot be exercised in a way that compromises the incentive structure for RBOC compliance with Section 251(c) that Congress built into Section 271 of the Act.

Initially, e.spire notes that Section 3(25)(B) provides the Commission with limited, authority to *modify* LATA boundaries. Recognizing the limited nature of this grant and the fundamental importance of existing LATA boundaries, the Commission has modified LATA boundaries pursuant to Section 3(25)(B) only in cases where the requested modification: (1) has been approved by the relevant state commission; (2) proposes only traditional POTS service; (3) demonstrates that the state commission found a sufficient community of interest to warrant the

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68 47 U.S.C. §251(c)(4).

69 *MO&O/NPRM*, ¶ 188.

70 *Id.* ¶¶ 190-196.

boundary waiver; (4) documents through surveys and other means that a "community of interest" exists; and (5) involves only a limited number of customers or access lines.[71]

In the context of advanced services, e.spire notes that the Commission already has permitted one very limited exception to this test by permitting Southwestern Bell Telephone ("SWBT") to provide ISDN service across a single LATA boundary in Texas.[72] Notably, the Commission's decision to grant limited LATA relief (and allow the use of equipment located in adjacent LATA to provide ISDN service), in this instance, relied heavily on three factors: (1) the Texas PUC had ordered SWBT to make available ISDN service to all customers in Texas; (2) SWBT estimated that only 20 or so customers in the entire Hearne, Texas LATA would purchase ISDN; and (3) SWBT's costs for upgrading equipment in the Hearne LATA would be in excess of $2 million.

Although it is unclear how the results of this decision comport with the Commission's Section 706 task of encouraging the deployment of advanced telecommunications *capability,* or whether alternative service offerings were available from other carriers, e.spire submits that the Commission's fact-specific, case-by-case approach to LATA modification requests is appropriate, as the grant of general modifications would exceed the Commission's authority under the Act. Indeed, the Supreme Court has noted that the Commission's authority to

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71 *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, Memorandum Opinion and Order, CC Docket No 96-159, FCC 97-244, ¶ 24 (rel. July 15, 1997).

72 *Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries to Provide Integrated Services Digital Network (ISDN) at Hearne, Texas,* Memorandum and Opinion Order, File No. NSD-LM-97-26 (rel. May 18, 1998).

"modify" portions of the Communications Act allows the Commission to adopt a "moderate change" and not "basic and fundamental changes in the scheme created by [the statute]."[73]

In this regard, e.spire notes that the express limitation on the Commission's Section 10 forbearance power, which states that the Commission "may not forbear from applying the requirements of section 251(c) or section 271 ... until such sections have been fully implemented" should underscore the importance Congress placed on those pro-competitive provisions and the degree to which the Commission's ability to "modify" them is limited.[74] Mindful of this limitation, the Commission, in the *706 Order*, denied several RBOCs' "requests for large-scale changes in LATA boundaries" based on the reasoning that grant of those requests "would be functionally the same as forbearing" from Section 271, which it is not permitted to do in the absence of RBOC compliance with that section. e.spire agrees with the Commission's conclusion, but also submits that it is not only "large-scale" changes that exceed the Commission's authority to *modify* LATA boundaries – grant of any generally applicable changes to or piercing of LATA boundaries would exceed that authority as well.

Accordingly, e.spire submits that the Commission may not grant relief similar to that granted by Congress for "incidental interLATA services" defined in Section 271(g). Congress already carefully has carved-out these exceptions to the RBOC interLATA services restriction. Section 10(d) forbids the Commission from adding to them. This conclusion is further underscored by the language of Section 271(h) which provides that "the provisions of subsection (g) are intended to be narrowly construed . . . .The Commission shall ensure that the provision of

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73 *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225 (1994).

74 47 U.S.C. § 160(d).

services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect . . . *competition* in any telecommunications market."[75]

Finally, e.spire notes that, even to the extent the Commission has authority to modify LATA boundaries, there simply is no evidence any interLATA relief is necessary to further the goals of Section 706 at this time. The trade press is rife with news of RBOC investments in and roll-outs of xDSL services – none of which are contingent on LATA boundaries. Indeed ILECs and their competitors appear to be responding to consumer demands for advanced services. As has been demonstrated in the Commission's docket concerning Bell Atlantic's "Emergency Petition" concerning the deployment of advanced telecommunications capability in West Virginia, the market is responding to these demands, even in rural areas.[76]

In sum, the challenge for the Commission is to determine whether an actual, acute shortage exists in a given geographic area or whether any perceived bandwidth shortfall is merely amounts to an "occasional, transient lack of supply."[77] Moreover, it should not be overlooked that the RBOCs control their own destiny and by demonstrating compliance with Section 271, *all* LATA restrictions can be removed. Premature relief in the form of numerous and general LATA modifications fundamentally would disrupt the regulatory balance of the 1996 Act – and, in so doing would withhold from consumers the benefits of effective competition in the markets for all telecommunications services.

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75 *Id.* § 271(h).

76 *In the Matter of Emergency Petition of Bell Atlantic-West Virginia for Authorization to End West Virginia's Bandwidth Crisis,* CC Docket No. 98-11 (filed July 22, 1998); *see Ex Parte* Letter from Frank S. Simone to Magalie Roman Salas, CC Docket No. 98-11, at 2-3 (filed Aug. 31, 1998); Comments of Helcion Corporation, CC Docket No. 98-11, at 5 (filed Aug. 10, 1998); Comments of Allegheny Communications Connect, Inc., CC Docket No. 98-11, at 2 (filed Aug. 10, 1998).

77 *NOI*, ¶ 33.

CONCLUSION

e.spire appreciates the Commission's efforts in producing both the *706 NOI* and the *706 Order and NPRM* and the opportunity to participate in this proceeding. In conclusion, e.spire urges the Commission to adopt rules and policies consistent with the foregoing discussion regarding the Commission's tentative conclusions and requests for additional proposals to promote local competition and ensure the timely deployment of advanced telecommunications services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John J. Heitmann, hereby certify that I have served a copy of the "Comments of e.spire Communications, Inc." this 25th day of September, 1998, upon the following parties *via* hand delivery:

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